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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 157

RYAN STEVEDORING CO., INC.,

Petitioner,

—v.—

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

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October Term, 1953

No.

Ryan Stevedoring Co., Inc.,

Petitioner,

—v.—

Pan-Atlantic Steamship Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Ryan Stevedoring Co., Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled action on March 25, 1954 (R. 372).

Petitioner herein seeks a review by this Court of only so much of the judgment, entered upon the decision of the United States Court of Appeals for the Second Circuit (R. 369-372), which granted indemnity in favor of Pan-Atlantic Steamship Corporation against the petitioner herein.

Opinions Below

The opinion of the United States District Court is officially reported in 111 F. Supp. 505. The opinion of the United States Court of Appeals for the Second Circuit is officially reported in 211 F. 2d 277 and appears at page 369 of the Transcript of Record.

Jurisdiction

The judgment of the United States Court of Appeals was entered on March 25, 1954. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

Questions Presented

(1) Is a contracting-stevedore, who complies with the provisions of the U.S. Longshoremen's and Harbor Workers' Compensation Act, Title 33, United States Code, §901 *et seq.*, insulated under the very wording of the Act (§905) from any claim or action in which full indemnity (there being no express contract of indemnity) is sought against him by a shipowner who has been held liable to an employee of the contracting stevedore.

(2) If the aforesaid Act, as worded, does not furnish complete immunity to a contracting stevedore against a claim of indemnity, implied in law, of a shipowner who has been liable to an injured employee of the contracting stevedore, can there be indemnity implied in the maritime law (there being no express contract of indemnity) between joint tortfeasors in a non-collision case, *i.e.*, a personal injury action.

(3) After the jury had rendered a verdict in favor of the injured longshoreman against the shipowner herein, Pan-Atlantic Steamship Corporation, the Trial Judge, sitting without a jury, pursuant to stipulation of the parties, decided all questions of fact and law respecting the shipowner's right of indemnity. Where the Trial Judge as the trier of the facts in a non-jury action has found that the shipowner and the contracting stevedore were joint tort

feasors, which is equivalent to a determination that the negligence of each caused or contributed to the accident, can an Appellate Court on review of the Trial Judge's findings in a non-jury case disregard his findings of causation and draw its own conclusions as to causation where it could not do so had a jury been the trier of the facts.

Statute Involved

The provision of the U.S. Longshoremen's and Harbor Workers' Compensation Act, Title 33, United States Code, §901 *et seq*, which is involved is §905 thereof which reads as follows:

"Exclusiveness of liability. The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. (Mar. 4, 1927, c. 509, §5, 44 Stat. 1426.)"

Statement of the Case

On July 20, 1949 one, Frank Palazzolo, a longshoreman employed by Ryan Stevedoring Co., Inc., hereinafter referred to as Ryan or petitioner, was injured aboard the S.S. Canton Victory, lying in navigable waters in the port of New York, when he was struck by a roll of paper pulp during said vessel's discharge at Brooklyn, New York.

The S.S. Canton Victory was operated, managed and controlled by Pan-Atlantic Steamship Corporation, hereinafter referred to as Pan-Atlantic or respondent.

The loading of the cargo of paper pulp was performed at Georgetown, S. C., by petitioner as was the discharge of the vessel at Brooklyn, N. Y.

To recover pecuniary damages for the personal injuries sustained by him, Palazzolo instituted an action against Pan-Atlantic in the Supreme Court of the State of New York, County of Kings, and Pan-Atlantic removed said action to the United States District Court for the Eastern District of New York.

In his complaint against Pan-Atlantic (R. 9-10) Palazzolo alleged that Pan-Atlantic had negligently caused, suffered and permitted rolls of paper pulp to be loaded and transported negligently and had failed to furnish a seaworthy vessel. The theory of Palazzolo's case was that a roll of paper pulp, which had not been "chocked" properly, had jumped out of its tier during the discharge of the rolls of paper pulp and had crushed his leg.

After the action had been removed, Pan-Atlantic impleaded Ryan (R. 17) and sought *indemnity* on allegations that Ryan was exclusively in control of the portion of the vessel where Palazzolo was hurt (R. 14, 15) and that if the rolls of paper pulp were loaded improperly on the S.S. Canton Victory and if the vessel were unseaworthy then said condition had been caused solely by Ryan.

At the opening of trial before Senior Judge Inch of the Federal Court in Brooklyn it was conceded that Ryan had complied with the provisions of the U.S. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §901 *et seq.*, and that in addition to compensation benefits there had been paid by Ryan's compensation carrier $9857.36 representing medical expenses in treating Palazzolo (R. 60, 61).

It was also stipulated between Pan-Atlantic and Ryan that all proof dealing with the claimed right of indemnity of Pan-Atlantic against Ryan was to be adduced before the Trial Court at the same time that Palazzolo tried his jury action against Pan-Atlantic and that the Trial Court, without benefit of jury, would determine as a matter of *fact* and *law* Pan-Atlantic's claimed right of indemnity or recovery over.

In accordance with the allegations of Palazzolo's complaint, and in line with the theory upon which Palazzolo's action had been tried, the jury was charged as to unseaworthiness and negligence. The jury rendered a general verdict of $75,000 against Pan-Atlantic (R. 336) upon which judgment was entered.

The Trial Court, in accordance with the stipulation between Pan-Atlantic and Ryan, having heard all of the witnesses in open court (there being no testimony adduced by way of deposition), handed down its decision (R. 355-359; 111 F. Supp. 505) denying any right of indemnity in favor of Pan-Atlantic and granting judgment to Ryan dismissing Pan-Atlantic's third party complaint.

Although Ryan urged to the Trial Court that its compliance with the U.S. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, and particularly §905 thereof, insulated Ryan completely from any claim of *indemnity*, the Trial Court preferred to place

its dismissal of Pan-Atlantic's third party complaint upon the findings of fact which it set forth in its opinion (R. 358-359; pp. 506 and 507 of 111 F. Supp.). They revolve around the *uncontradicted* testimony of Pan-Atlantic's own cargo mate, Captain Fisher.

This *uncontradicted* testimony shows that although it was Ryan's job to load the S.S. Canton Victory at Georgetown it had to be done "however to the general satisfaction of the mate in charge of the vessel, the master, and the chief officer and his under officers" (R. 236). Captain Fisher's job was to go in and out of the five holds to check to see that Ryan was loading the cargo properly and chocking it for his "primary job, of course, was watching the cargo, this is in port, and to see that it is loaded and stowed properly for the safety of the vessel and the cargo and the crew that sails the vessel" (R. 259). He recognized that his job of supervision was important in so far as it also involved the safety of the longshoremen who came on board to discharge the vessel (R. 276). The Trial Court, completely supported by the record, found as a fact (R. 358) that

> "the cargo mate was in hold No. 3, where the accident occurred, both at the time of loading and unloading to see that everything was properly done and that he was 'primarily concerned to check the damage or the pilferage or *any unsafe method or practice*.'" (Single quoted matter and italics so indicated in original opinion.)

According to the cargo mate everything was done properly by Ryan and no complaints were made by him (R. 358).

The ultimate finding of the Trial Court, which sums up appropriately all of the uncontradicted testimony given by the cargo mate, is this (R. 359):

"Captain Fischer's (sic) own testimony shows his complete knowledge of the loading and unloading operation, the opportunity and ability on his part to discover the defect in stowage at either the loading or unloading port, and his authority to remedy the condition or halt the work."

The Trial Court in denying indemnity to Pan-Atlantic concluded that Pan-Atlantic and Ryan were joint tort-feasors.

Pan-Atlantic appealed from the judgments entered in Palazzolo's and Ryan's favor.

The U. S. Court of Appeals for the Second Circuit affirmed the judgment in favor of Palazzolo but reversed the judgment in Ryan's favor and directed judgment in favor of Pan-Atlantic against Ryan (R. 369-373; 211 F. 2d 277).

This application for a writ of certiorari then followed.

Reasons for Granting the Writ

1. The first question that petitioner presents to this Court is the judicial construction to be accorded to the "exclusive remedy" provision of the U.S. Longshoremen's and Harbor Workers' Compensation Act, §905 of Title 33 of the United States Code, in so far as it bears upon and controls claims of indemnity (implied in law) by shipowners against stevedores in personal injury actions arising out of maritime torts. The question of the judicial construction to be accorded §905 of Title 33, United States Code, is singularly important to the shipping industry[1]

[1] Petitioner understands that the National Association of Stevedores, an organization that represents stevedoring firms in all the major ports of the United States, will seek leave to file a brief amicus curiae in support of Ryan's

for in every port of the United States where stevedoring of vessels takes place and accidents arise therefrom it is a foregone conclusion that an injured longshoreman will bring action against the shipowner who in turn will implead the stevedore-employer and seek indemnity implied in law.

This type of hydra-headed litigation is omnipresent and all courts which have been confronted[2] in recent times with the problem of the judicial construction to be placed upon this federal statute, whether it be in *contribution* or *indemnity* actions, have gone in all directions.

This Court in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, decided January 14, 1952, 342 U. S. 282, 74 S. Ct. 203, found it unnecessary to determine whether §905 (Section 5 of the Act) was a bar to a claim of *contribution* for it based its decision on other grounds. Research has disclosed no case where this Court has, even by way of dicta, pointed the way out of the morass and welter of

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petition so that the stevedoring industry may obtain a determination of the perplexing problem presented by §905 of Title 33 of the United States Code, which is exemplified by the authorities which are set forth in footnote 2 of this petition.

2. Thus, we find the problem decided or discussed within rather recent times in the following opinions: *American Mutual Liability Insurance Co.* v. *Matthews*, 2 Cir., 182 F. 2d 322; *Gill* v. *U. S.*, 2 Cir., 184 F. 2d 49; *Slattery* v. *Marra Bros.*, 2 Cir., 186 F. 2d 134; *Mikkelsen* v. *The Granville*, 2 Cir., 191 F. 2d 858; *States SS Co.* v. *Rothschild International Steve. Co.*, 2 Cir., 205 F. 2d 253; *Crawford* v. *Pope & Talbot Inc.*, 3 Cir., 206 F. 2d 784; *Brown* v. *American-Hawaiian SS Co.*, 3 Cir., 211 F. 2d 16; *Union Sulphur & Oil Corp.* v. *W. J. Jones & Son*, 9 Cir., 195 F. 2d 93; *Standard Wholesale P & A* v. *Ruckert Terminals Corporation*, 1949 A. M. C. 818, 193 Md. 20; *Liberty Mutual Ins. Co.* v. *Vallendingham*, 94 F. Supp. 17; *Baird* v. *McShain Inc.*, 108 F. Supp. 553; *Coates* v. *Potomac Electric Power Co.*, 95 F. Supp. 779, 96 F. Supp. 1019; *Miranda* v. *City of Galveston*, 98 F. Supp. 245; *Landberg* v. *Prudential Steamship Corp.*, 102 F. Supp. 115; *Valerio* v. *American President Lines*, 112 F. Supp. 202; *Dubetz* v. *North American Shipping Co.*, not officially reported, reported in 1951 A. M. C. 492; *Lukasiewicz* v. *Moore McCormack Lines*, 104 F. Supp. 572; *Barber SS Lines* v. *Quinn Bros.*, 104 F. Supp. 78.

confusion which results from a reading of the decisions of the lower courts which are set forth in footnote 2 hereof.

Where the Congress has in clear and explicit language stated in Section 5 of the Act (§905 of Title 33 of the United States Code) that the liability of an employer, as prescribed in Section 4 of the Act, to wit, compensation, "shall be exclusive and in place of *all other liability of such employer to * * * anyone otherwise entitled to recover damages from such employer* at law or in admiralty on account of such injury" it would appear that a stevedore-employer should be entitled "to rest on the clear, unambiguous words of the statute" (*Baird v. John McShain, Inc.*, 108 F. Supp. 553). Especially should this be so where there has never been any evidence in any decision that the legislative intent, as evidenced by hearings, reports, etc., was other than that which the Congress mirrored in the explicit language it employed in Section 5 of the Act.

The benefits which the Congress creates are often measured by the interpretation placed upon them by the judiciary. The benefits that the Congress has created under the Act in question are (1) a guaranteed compensation to an employee for every injury arising out of and in the course of employment, with fault or negligence playing no part, and (2) an absolute, certain, exclusive and circumscribed liability on the part of the employer. As Congressman Graham said in speaking on the floor of the House of Representatives in favor of the adoption of the Act (Congressional Record, 69th Congress, Second Session, March 2, 1927, Vol. 68, p. 5411):

> "Hearings were granted, conferences were held and every endeavor made to secure a bill that would be beneficial to the workman and not oppressive to the employer and that would not be a destructive burden on industry; and I think we have accomplished that."

Manifestly, Congressional intent in part was that the Act should and would "not be oppressive to the employer", or a "destructive burden on industry."

And yet, if impleader by shipowners of stevedoring companies continues in actions wherein the stevedore's employees have sued the shipowner, which impleader is the highly fashionable trend and practice today in the various ports of the United States, the stevedore will be constantly forced to defend such actions even though he has complied with the provisions of the Act—this, in complete nullification of the clear and explicit language of the Congress that there shall be no other liability on the part of the stevedore to "anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury." To allow the continuance of the impleader of stevedores-employers is to sanction what actually amounts to law suits against them by their own employees —this, in contravention to the Act. The shipowner, the primary defendant and third party plaintiff, has become and will become a mere conduit through whom the injured employee-longshoreman recovers from his stevedore-employer. The result destroys the basic principle of compensation. (See, *Johnson* v. *United States*, 79 F. Supp. 448.)

Further, this Court in recent decisions (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Pope & Talbot Inc.* v. *Hawn*, 346 U. S. 406; *Alaska Steamship Company* v. *Petterson*, decided April 5, 1954, 74 S. Ct. 601) has determined the rights of injured maritime workers against shipowners and has crystallized the federal law applicable thereto. From the recent decision in the *Petterson* case, *supra*, it certainly is to be anticipated that shipowners, now held liable to independent contractor's employees for gear which is supplied by the stevedore-employer, will implead the independent contractors-employers and seek *indemnity* from said

employers. There being no decision[3] from this Court determining the rights and obligations of shipowner and stevedore-employer *inter sese*, in the light of the Act here involved, settlement of the judicial construction of this federal statute, its proper functioning and administration, which statute will always be involved where the parties are aligned as they have been in this litigation, should, it is respectfully submitted, emanate from this Court.

2. This Court has never determined, in so far as research has disclosed, that in a maritime tort non-collision case the maritime law which is here applicable (*Pope & Talbot Inc. v. Hawn*, 346 U. S. 406) implies indemnity in favor of one joint tortfeasor against another joint tortfeasor. It would appear that this Court and the U. S. Court of Appeals for the Second Circuit have looked at contribution and indemnity as merely projecting a question of the *quantum* of recovery. In *Erie R. Co. v. Erie & W. Transp. Co.*, 204 U. S. 220, this Court characterized a division of damages, *viz.*, contribution, as "partial indemnity."

The U. S. Court of Appeals for the Second Circuit, per Chief Judge L. Hand, forcefully characterized this principle in *Slattery v. Marra Bros.*, 186 F. 2d 134, as follows (p. 138):

> " " " Such cases (dealing with indemnity on the basis of active-passive negligence) may perhaps be accounted for as lenient exceptions to the doctrine that there can be no contribution between joint tortfeasors, *for indemnity is only an extreme form of contribution.*" (Parenthetical matter and italics supplied.)

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3. As has been indicated heretofore, *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, does not reach the question here presented, by virtue of this Court's express statement in footnote 12 of its decision (p. 286 of 342 U. S.) that it was unnecessary to construe the Act here involved in view of the holding arrived at.

If there is no difference in theory between *contribution* and *indemnity* then it would appear that the decision of the U. S. Court of Appeals in this matter is in conflict with the "principle" enunciated by this Court in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282. Such conflict "in principle" should, it is respectfully submitted, commend itself to this Court's granting the writ respectfully prayed for in order to resolve said conflict.

3. If the action of Pan-Atlantic against Ryan had been tried by a jury a federal Appellate Court, upon review, would be bound to ascertain whether there was any evidence in support of the findings made by, or verdict of, the jury and once it had found that the jury's determination was supported by the evidence it could not substitute its own inferences for that of the jury. Had the right over in this matter been tried by jury it would seem that the question of who was actively or passively negligent would be a question of fact for the jury. For, as the New York Court of Appeals recently said in *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 328:

> "Whether negligence is passive or active is, generally speaking, a question of fact for the jury."

In the instant matter the Trial Court in its opinion held that Pan-Atlantic and the petitioner were joint tortfeasors and denied any recovery for the inherent reason that the finding of a joint tortfeasor relationship necessitated the corollary finding that the negligence of each was of such a quality that it caused or contributed to the happening of the accident. In so far as causation is concerned the U. S. Court of Appeals for the Second Circuit has held that causation is a question of fact. *F. E. Grau-*

willer Transp. Co., Inc. v. Gallagher Bros. Sand & Gravel Corporation, 153 F. 2d 384, 385.

Despite the foregoing the U. S. Court of Appeals in this matter determined that the "*sole*" "*active*" or "*primary*" *cause* of the accident to Palazzolo was the negligence of Ryan in the loading of the vessel. Completely overlooked and, indeed, not mentioned was the Trial Court's finding, supported by the uncontradicted testimony set forth in its opinion, that Pan-Atlantic affirmatively and actively caused the accident and participated in bringing the same about.

In reversing the finding of the Trial Court, which finding is completely supported by the record, the U. S. Court of Appeals has projected uncertainty as to the scope of appeals in maritime or non-jury actions.

This matter commends itself to a consideration by this Court of the scope of appeals in non-jury cases of the type here involved because of its importance to the proper operation of the federal system of appellate review in maritime non-jury matters. (Cf. *McAllister v. United States*, 207 F. 2d 535; certiorari granted, April 5, 1954, No. 566, U.S. Law Week, April 6, 1954, 22 LW 3250.)

ARGUMENT

Ryan's compliance with the U. S. Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §901 *et seq.*, is a complete bar to any claim of indemnity by Pan-Atlantic against Ryan.

Upon the trial of this matter it was conceded (R. 60-61):

> "that Ryan Stevedoring Co., Inc., in compliance with the terms of U.S. Longshoremen's and Harbor Workers' Compensation Act, in pursuance thereto there were paid by the compensation carrier for Ryan Stevedoring Company certain sums for compensation and $9857.36 as medical expenses, the reasonableness of which medical expenses is conceded by all concerned."

Having therefore complied with the provisions of the statute dealing with compensation, 33 U.S.C.A. §904, and with medical services, 33 U.S.C.A. §907, Ryan invoked as a defense (R. 20-21) and presented to the Trial Court for determination the effect of §905 of 33 U.S.C.A. which reads as follows:

> "The liability of an employer prescribed in section 904 of this chapter *shall be exclusive and in place of all other liability of such employer to* the employee, his legal representative, husband or wife, parents, dependents, next of kin, and *anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury* * * *" (Italics supplied.)

These words are clear, unambiguous and unequivocal and no aids to legislative intent need be sought in this instance.

If any were sought, they would aid Ryan's contention, if at all.[4]

The Trial Court did not place its exoneration of Ryan upon the language of this federal enactment but decided the claim of indemnity in favor of Ryan and against Pan-Atlantic upon the proof which had been adduced.

Upon Pan-Atlantic's appeal, Ryan presented to the U. S. Court of Appeals for the Second Circuit the same argument with respect to the statute here involved. It called the Court's attention to the entire line of cases which had been decided by that Court in which it had taken the position either in direct holding or in dicta that the Act meant exactly what it said, to wit, a complete immunity of the employer (where it had covered its employee with the benefits of the Act) from "all other liability to * * * anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury."

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4 The words are somewhat illumined by the legislative history, however brief and meager it is. Thus, when the Act, as a bill (S. 3170) was introduced on February 17, 1926 by Mr. Cummins it was referred to the Senate Committee on the Judiciary (Cong. Rec., 69th Congress, 1st Session, Vol. 67, p. 4119). It held hearings on March 16, 1926 and on April 2, 1926 (Hearings before a sub-committee of the Committee on the Judiciary, United States Senate, 69th Congress, 1st Session). In Senate Report S. 973, it is stated that (p. 16):

> "Sections (4) (5) and (6) of the bill contain the appropriate provisions for making certain that compensation will be paid, *abolishing liability on the part of the employer except for the payment of the prescribed compensation*, and fixing the time at which compensation begins." (Italics supplied.)

S. 3170, as amended, said amendment not being material to the question at hand, passed the Senate on June 3, 1926 (Cong. Rec. for June 3, 1926, p. 10611) and was later referred to the House Committee on the Judiciary (p. 10820 of Cong. Record for June 7, 1926). H. Rept. 1767, dated January 14, 1927, amended S. 3170, which amendment, although not germane, was eliminated when debated (Cong. Rec., Vol. 68, p. 5402). The meager debates in Congress, the Reports of the House and Senate Committees are completely devoid of even a suggestion that §905 of 33 U. S. C. A. (Section 5 of the Act) does not mean exactly what the explicit language says.

Thus, it was argued to the Court below that in *American Mutual Liability Insurance Co.* v. *Matthews*, 182 F. 2d 322, in dealing with a claim of *contribution* (there being no written contract) and the statute as a defense thereto it had said (p. 324):

> "To impose a non-contractual duty of contribution on the employer is *pro-tanto* to deprive him of the immunity which the statute grants him in exchange for his absolute, though limited, liability to secure compensation to his employees."

In dealing with the effect of §905 of 33 U.S.C.A. as a *release* from a claim of recovery, L. Hand, *Ch.J.*, in a concurring opinion in the cited case said (p. 325):

> "* * * and the reason why I think it should be so construed is that it (the Act) has imposed upon employers an absolute, though limited, liability, in exchange for a release from the preceding unlimited liability, conditional upon negligence." (Parenthetical matter supplied.)

Having disallowed *contribution* on the basis of the statute here involved, the Court below had also disallowed *indemnity*—and this also by reason of the statute.

In *Gill* v. *U. S.*, 184 F. 2d 49, where the United States (shipowner) sought *indemnity* from the employer, Turner & Blanchard, Inc. (Record on Appeal in cited case—folio 45), the question was disposed of in the opinion as follows (p. 55):

> "The dismissal of the cross libel against Turner and Blanchard, Inc., which paid libellant under the provisions of the Longshoremen's and Harbor Workers' Compensation Act was without error. 33 U.S.C.A.

905; American Mutual Liability Ins. Co. v. Matthews, 2 Cir., 182 F. 2d 322."

Eight months after the *American Mutual* case, *supra*, the Court below again had occasion to express its views as to a compensation Act (this time, New Jersey's) being a defense to a claim of *indemnity*. The Court, in an opinion by L. Hand, *Ch.J.*, in *Slattery* v. *Marra Bros.*, 186 F. 2d 134, after reviewing cases dealing with "active"-"passive" negligence said (p. 138):

> "* * * Such cases (dealing with active-passive negligence) may perhaps be accounted for as lenient exceptions to the doctrine that there can be no contribution between joint tortfeasors, *for indemnity is only an extreme form of contribution.*" (Parenthetical matter and italics supplied.)

The Court in holding that *indemnity* was not rationally possible where the putative indemnitor was the employer of the plaintiff (and therefore not liable to the injured plaintiff, his employee) said (p. 139):

> "We cannot, however, agree that that result (indemnity) is rationally possible except upon the assumption that both parties are liable to the same person for the joint wrong." (Parenthetical matter supplied.)

Following this theme the Court then significantly said (p. 139):

> "So far as we can see therefore *there is nobody of sure authority for saying that differences in the degrees of fault will without more strip one of them, if he is an employer, of the protection of a compensation act;* and we are at a loss to see any tenable principle which can support such a result." (Italics supplied.)

The reasoning of the foregoing was reaffirmed by said Court in passing to the actual question for disposition in *LoBue* v. *U. S.*, 188 F. 2d 800, where Judge Frank, writing for a unanimous Court in overruling the contention raised by the ship that indemnity could be obtained from a stevedore for an alleged breach of a stevedore's duty to the shipowner to do the work in a careful and efficient manner said (p. 803):

> "And we do not think that there can be any recovery over of indemnity under the maritime law for Jarka's breach of its duty to the United States to do its work in a careful, efficient manner. The cases which sanction such a liability over on an indemnity theory are inapplicable here, for in those cases, the employer's negligence was the 'sole,' 'active' or 'primary' cause of the libellant's injury. And to permit a partial recovery over on an indemnity theory here would be to sanction an evasion of the rule and the rationale of the Matthews case, supra, by a mere change in nomenclature from 'contribution' to 'indemnity.'"

On June 28, 1951, Judge Abruzzo in *Mikkelsen* v. *The Granville,* 101 F. Supp. 566, dismissed a petition of a shipowner seeking *indemnity* from the injured person's employer. Judge Abruzzo, not finding any contract of indemnity (which is the fact in the case at bar) and relying upon *American Mutual Liability Ins. Co.* v. *Matthews,* 182 F. 2d 322, dismissed the petition for he found that (p. 569):

> "the Longshoremen's and Harbor Workers' Act is a valid defense to that petition."

The petition alleged *inter alia* that the employer failed to properly use the gear and to avoid *creation* of dangerous

conditions (p. 566 of 101 F. Supp., bottom of right hand column).

Remembering that the dismissal of the petition for *indemnity* resulted from exceptive allegations (p. 568 of 101 F. Supp.—top of left hand column) which posed *solely* as a defense the compliance of the employer with the U.S. Longshoremen's and Harbor Workers' Compensation Act, we find that the Court below affirmed the dismissal of the petition, 191 F. 2d 858, in a Per Curiam opinion which tersely said:

> "Affirmed on the authority of American Mutual Liability Ins. Co. v. Matthews, 2 Cir., 182 F. 2d 322."

Rehearing was denied in 192 F. 2d 809.

Other courts have understood the foregoing cases, decided by the Court below, to stand for the proposition that the Act is a complete bar to any claim of recovery over under the law, absent a contract, by the shipowner against the injured workman's employer. In this connection, see

> *Standard Wholesale P. & A. v. Buckert Terminals Corporation*, 1949 A.M.C. 818, 193 Md. 203 (Court of Appeals of Maryland);
>
> *Liberty Mut. Ins. Co. v. Vallendingham*, 94 F. Supp. 17;
>
> *Baird v. John McShain Inc.*, 108 F. Supp. 553.

Then, of course, there are decisions such as *Stafes SS Co. v. Rothschild International Steve. Co.*, 9 Cir., 205 F. 2d 253; *Crawford v. Pope & Talbot, Inc.*, 3 Cir., 206 F. 2d 784; and *Brown v. American-Hawaiian SS Co.*, 3 Cir., 211 F. 2d 16, which have held that the statute is not a bar.

In the case at bar, the Court below bypassed the interpretation of the Act and granted indemnity on *its own*

finding as to proximate cause, contrary to that of the Trial Court. In arriving at the result it did, it inferentially, without any reference to its own decisions, heretofore set forth, overruled said decisions for manifestly had it adhered to them it would have decided this matter as one of law and never reached the question of fact upon which it placed its holding.

The construction to be accorded this Act and the particular section thereof which is here involved has plagued the Courts below and litigants generally. Reference is merely made to the host of decisions in footnote 2 hereof as indicative of the difficulty projected by the Act.

Ryan's position is that it is incumbent upon the respondent herein and all shipowners who seek indemnity from an employer of an injured plaintiff to show by convincing proof that the Congress did not mean what it said in the explicit language it used in §905 of 33 U.S.C.A.

In no decision bearing upon the point, whether it be in support or in refutation of Ryan's contention, has it been shown that Congress intended anything at variance with the plain and explicit wording of §905. Certainly, Pan-Atlantic has not done so here.

The plain and obvious fact is that the Congress never contemplated and therefore had no intention in either direction respecting third party indemnity situations—this, prior to the passage of the Act, here involved, on March 4, 1927.[5] Congress simply intended that the liability

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5 It was not until 11 years thereafter that the N. Y. Court of Appeals held that the N. Y. Workmen's Compensation Act did not furnish a defense to a claim of indemnity by a third person against an employer (*Westchester L. Co. v. Westchester C. S. E. Corp.*, 278 N. Y. 175). Similarly, it was not until 12 years after the passage of the U. S. Longshoremen's and Harbor Workers' Compensation Act that a District Court placed the same gloss upon the federal Act, influenced by the *Westchester* case, *supra*. *Bodden v. Jacka Corporation*, 26 F. Supp. 804.

[Continued on next page]

provided for in the Act should be absolutely exclusive and expressed that intention in §905 of 33 U.S.C.A. (Section 5 of the Act).

That would be the only practical conclusion, irrespective of the explicit wording of §905, in order to make the sections of the Act an harmonious well integrated whole.

If §905 were construed contrary to its plain wording it would result in a stevedore and/or its compensation carrier controverting every claim of compensation, with a possible resultant penalty therefor, in order that a formal award could be obtained. The formal award would then assign to the stevedore or its compensation carrier (§933 [i]) title to the third party action. §933(b) of 33 U.S.C.A. These mechanics would fly in the very teeth of §914 of 33 U.S.C.A. which provides for the *prompt* payment of compensation without an award. Nonetheless, a stevedore or compensation carrier would have to controvert every claim so that upon the formal award and the resulting assignment of title to the third party action it would have control over any third party action. Only by obtaining title in such a matter would its liability become absolute and exclusive.

Surely, Congress did not intend that such mechanics be used in order that the stevedore obtain the "exclusive" liability of which Congress spoke in explicit language.

If the scheme of things is to change, then Congress should legislate further to modify its explicit language.

Certainly, Congressional intent, evidenced by explicit language, cannot be ascertained by decisions which have been handed down 11 and 12 years after Congress had spoken. See for example, *Iacono v. Cardillo*, 208 F. 2d 696.) The stevedore should not impute to Congress an intention which it did not express in the explicit language it employed.

If there is no difference in theory in the maritime law between contribution and indemnity and if said terms merely connote a difference in the *quantum* of recovery, then there can be no indemnity in the absence of any legislation by the Congress authorizing the same in this, a maritime non-collision tort action. This Court has never determined in a maritime non-collision tort case that a shipowner who is held liable to an injured maritime worker can obtain indemnity under the maritime law from said worker's employer.

Research has disclosed no case where this Court has held that there can be indemnity, as implied in the maritime law, in a personal injury case, *i.e.*, non-collision, where the putative indemnitee has been held liable to the putative indemnitor's employee.

Indemnity has been characterized as "an extreme form of contribution." *Slattery* v. *Marra Bros.*, 186 F. 2d 134, 138. Similarly contribution has been characterized as "partial indemnity." *Erie R. Co.* v. *Erie & W. Transp. Co.*, 204 U. S. 220. Preliminarily it would therefore appear that there is no difference in theory between contribution and indemnity and that such terms connote a difference in the *quantum* of recovery, *i.e.*, indemnity in part or full recoupment.

If there is no difference in theory between contribution and indemnity, then the result arrived at by this Court in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, is the touchstone in this matter. Since this Court has not determined whether there can be indemnity in a maritime personal injury action in favor of a shipowner against the employer of the injured maritime worker there would seem to be, as the law stands at present writing, a conflict "in principle" between the holding of the Court below and the *Halcyon* decision, *supra*.

Palazzolo's witnesses described how the rolls of paper pulp were secured by mere pieces of scrap dunnage and how the customary wedges had not been supplied nor used by the ship because Pan-Atlantic didn't believe in wedges.

The uncontradicted testimony of Captain Fisher, who was the cargo mate in charge of the loading and unloading operation, has been heretofore set forth and the same dictated the Trial Court's finding that Captain Fisher had

> "complete knowledge of the loading and unloading operation, the opportunity and ability on his part to discover the defect in stowage at either the loading or unloading port, and his authority to remedy the condition or halt the work" (R. 359).

In view of the foregoing testimony and under the charge of the Trial Court dealing with negligence and unseaworthiness, it is indisputable that inherent in the jury's verdict is the finding that Pan-Atlantic had been negligent by virtue of Captain Fisher's active conduct.

If there can be indemnity, implied by the maritime law between joint tortfeasors, then fundamental principles respecting indemnity, found in the common law, must or should be accepted by the maritime law. One of the fundamental principles is that a putative indemnitee is barred by the wrongful nature of his conduct from obtaining indemnity if as between the putative indemnitee and the putative indemnitor it was the latter's obligation to discharge a certain duty. *Restatement of Restitution*, §76. Further, there can be no indemnity where after discovery of danger the putative indemnitee acquiesces in the continuation of the condition. *Restatement of Restitution*, §95.

In the absence of any authoritative decision from this Court the decisions of the State and Federal Courts dealing with claims of indemnity have employed various phrase-

ology in disposing of said claims. Disposition at times has revolved around "active and passive negligence," "active and passive cause," "primary and secondary negligence," "primary and secondary duty," "primary and secondary cause," "joint tort feasors" and "particeps criminis." Nomenclature has been imprecise at times.

However, one thread binds up all these decisions. The thread common to all or the principle by which contentions for indemnity are parsed is that one who has participated by active conduct in a tort can have no recovery over. *Mikkelsen* v. *The Granville*, 192 F. 2d 809; see excellent discussion in *Falk* v. *Crystal Hall, Inc.*, 200 Misc. 979, aff'd 279 App. Div. 1071; *Phoenix Bridge Co.* v. *Creem*, 102 App. Div. 354, 356, aff'd 185 N. Y. 580; *Edwards* v. *Sophkirsh Holding Corp.*, 280 App. Div. 168, aff'd 304 N. Y. 850; *Adler* v. *Tully & DiNapoli, Inc.*, 274 App. Div. 1001, aff'd 300 N. Y. 662; *Dolnick* v. *Edward Donner Lumber Corp.*, 275 App. Div. 954, aff'd 300 N. Y. 660.

Since it is fundamental learning that indemnity, as implied by the common law in certain circumstances, is an equitable doctrine and that the delinquencies of the parties are to be weighed on the basis of the ethical quality of their tortious acts, it was, it is respectfully submitted, gross inequity for the Court below to have reversed the Trial Court and to have granted indemnity in favor of Pan-Atlantic (assuming *arguendo* that indemnity exists in the maritime law in a personal injury action) where Pan-Atlantic, the putative indemnitee, had been found by the jury by virtue of its general verdict to have *furnished* improper gear and to have been in complete control of the operation of loading and discharging the vessel.

If indemnity exists under the maritime law where the parties are aligned as they are in the instant matter then to allow a recovery over by Pan-Atlantic against the petitioner herein would also place a premium on inaction

(*Falk v. Crystal Hall*, 200 Misc. 979, 985, aff'd 279 App. Div. 1071) and allow a shipowner to point his finger at a stevedoring firm and say

> "I am furnishing you with defective equipment but I have a right over against you in the event that one of your employees is injured thereby. I also observe your loading and discharging operations and they are all right with me now but if a court or jury should hereafter hold that I guessed wrong then the court will allow me to get indemnity from you although at this time I am folding my arms and telling you that you are properly performing your stevedoring services."

In determining that the "sole" "active" or "primary" *cause* of the accident was the negligence of petitioner, the Court below has reversed a finding of fact respecting proximate cause made by the Trial Court, whose exclusive province it was to make such a finding. In reversing the Trial Court's finding of fact respecting proximate cause, the Court below has ruled contrary to Rule 52(a) of the Federal Rules of Civil Procedure and has injected uncertainty with respect to the limits or scope of appellate review in non-jury cases.

If indemnity exists in the maritime law in favor of a shipowner against the employer of an injured maritime worker in a personal injury action, then admiralty has adopted, although never so held by this Court, that there are different degrees of fault or negligence between tortfeasors which different degrees of negligence constitute tortfeasors either "active" or "passive."

As has been said by the New York Court of Appeals in *McFall v. Compagnie Maritime Belge*, 304 N. Y. 314, 328:

"Whether negligence is passive or active is, generally speaking, a question of fact for the jury."

If Pan-Atlantic and Ryan had not stipulated that all questions of fact and law were to be tried and to be determined exclusively by the Trial Court, without benefit of a jury, then in the normal course of procedure the entire case would have gone to the jury for determination in contrast to merely Palazzolo's right of recovery against Pan-Atlantic. Had the jury decided, as the Trial Court actually did in this case, that Pan-Atlantic and Ryan were joint tortfeasors and that Pan-Atlantic was not entitled to recover indemnity from Ryan, we think it could not be gainsaid that the Court below would have been limited on its review to determining whether there was evidence to support the finding of the jury. Where the Trial Court has become, pursuant to the stipulation of Pan-Atlantic and Ryan, the trier of the facts respecting the right of indemnity, does not the same rule or yardstick apply respecting the scope or limit of review by the Court below?

Manifestly, in order to have arrived at the conclusion it did the Trial Court must have inherently found that the negligence of Pan-Atlantic and Ryan caused or contributed to the happening of the accident. Such a question of causation is a question of fact. *F. E. Granciller Transportation Co., Inc.* v. *Gallagher Sand & Gravel Corporation*, 153 F. 2d 384, 385.

Without any justification except its own views or the inferences which it drew from the record, where all of the witnesses were heard in open court by the Trial Court, the Court below determined that the "sole" "active" or "primary" *cause* of the accident to Palazzolo was the negligence of Ryan. Completely overlooked and, indeed, not even mentioned by the Court below, was the Trial Court's

finding, as reflected by the testimony which the Trial Court set forth *in extenso* in its opinion, that Pan-Atlantic affirmatively and actively, through its Captain Fisher, caused and participated in bringing the accident about.

In reversing the finding of the Trial Court, which finding is completely supported by the record, the Court below has projected uncertainty as to the scope of appeals in admiralty or non-jury actions, the resolution of which question in the proper operation of the federal system of appellate review should, it is respectfully submitted, be considered by this Court.

WHEREFORE, this case, it is respectfully submitted, merits the decision of this Court.

Respectfully submitted,

RYAN STEVEDORING CO., INC.

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